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PERMITTING INDIAN TRIBES TO ENTER INTO CERTAIN AGREEMENTS FOR THE DISPOSITION OF TRIBAL MINERAL RESOURCES, AND FOR OTHER PURPOSES

AUGUST 13, 1982.—Committed to the Committee of the Whole House on the State of the Union and ordered to be printed

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Mr. UDALL, from the Committee on Interior and Insular Affairs, submitted the following

COMPLETED

REPORT

[To accompany S. 1894]

The Committee on Interior and Insular Affairs, to whom was referred the bill (S. 1894) to permit Indian tribes to enter into certain agreements for the disposition of tribal mineral resources, and for other purposes, having considered the same, report favorably thereon with an amendment and recommend that the bill as amended do pass.

The amendment is as follows:

Page 1, line 3, strike all after the enacting clause and insert the following:

That this Act may be cited as the "Indian Mineral Development Act of 1982".

SEC. 2. For the purposes of this Act, the term—

(1) "Indian" means any individual Indian or Alaska Native who owns land or interests in land title to which is held in trust by the United States or is subject to a restriction against alienation imposed by the United States;

(2) "Indian tribe" means any Indian tribe, band, nation, pueblo, community, rancheria, colony, or other group which owns land or interests in land title to which is held in trust by the United States or is subject to a restriction against alienation imposed by the United States; and

(3) "Secretary" means the Secretary of the Interior.

SEC. 3. (a) Any Indian tribe, subject to the approval of the Secretary and any limitation or provision contained in its constitution or charter, may enter into any joint venture, operating, production sharing, service, managerial, lease or other agreement, or any amendment, supplement or other modification of such agreement (hereinafter referred to as a "Minerals Agreement") providing for the exploration for, or extraction, processing, or other development of, oil, gas, uranium, coal, geothermal, other energy or nonenergy mineral resources (hereinafter referred to as "mineral resources") in which such Indian tribe owns a trust or or restricted interest, or providing for the sale or other disposition of the production or products of such mineral resources.

(b) Any Indian owning a trust or restricted interest in mineral resources may include such resources in a tribal Minerals Agreement subject to the concurrence of the parties and a finding by the Secretary that such participation is in the best interest of the Indian.

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SEC. 4. (a) The Secretary shall approve or disapprove any Minerals Agreement submitted to him for approval within (1) one hundred and eighty days after submission or (2) sixty days after compliance if required, with section 102(2)(C) of the National Environmental Policy Act of 1969 (42 U.S.C. 4332(2)(C)) or any other requirement of law, whichever is later. Any party to such an agreement may enforce the provisions of this subsection pursuant to section 1361 of title 28, United States Code.

(b) Not later than thirty days prior to formal approval or disapproval of any Minerals Agreement, the Secretary shall provide written findings forming the basis of his intent to approve or disapprove such agreement to the affected Indian tribe. Notwithstanding any other law, such findings and all projections, studies, data or other information possessed by the Department of the Interior regarding the terms and conditions of the Minerals Agreement, the financial return to the Indian parties thereto, or the extent, nature, value or disposition of the Indian mineral resources, or the production, products or proceeds thereof, shall be held by the Department of the Interior as privileged proprietary information of the affected Indian or Indian tribe.

(c) The authority to disapprove agreements under this section may only be delegated to the Assistant Secretary of the Interior for Indian Affairs. The decision of the Secretary or, where authority is delegated, of the Assistant Secretary of the Interior for Indian Affairs to disapprove a Minerals Agreement shall be deemed a final agency action.

SEC. 5. In approving or disapproving a Minerals Agreement, the Secretary shall determine if it is in the best interest of the Indian tribe and, in connection therewith, shall consider, among other things,—

(1) the economic return provided in the agreement in relation to the economic potential of the mineral resource involved;

(2) the nature of the advice and technical assistance available to the Indian tribe in the negotiation of the agreement;

(3) the potential environmental, socio-economic, and cultural effects of the implementation of the agreement on the tribe and its members;

(4) any provisions in the agreement for tribal access to management, financial, production and other operating information;

(5) any provisions in the agreement relating to diligent exploration and development or tribal monitoring, review, and amendment; and

(6) any provisions in the agreement for resolving disputes which may arise between the parties over the terms or implementation of the agreement.

Provided, That the Secretary shall not be required to prepare any study regarding environmental socio-economic, or cultural effects of the implementation of a Minerals Agreement apart from that which may be required under section 102(2)(C) of the National Environmental Policy Act of 1969 (42 U.S.C. 4332(2)(C).

SEC. 6. (a) Minerals Agreements, which by their terms do not purport to be leases, entered into by any Indian tribe and approved by the Secretary after January 1, 1975, but prior to the enactment of this Act, shall be processed as provided in this section.

(b) Where an Indian tribe has requested ratification of the Secretary's authority to approve an agreement covered under subsection (a) of this section by notifying the Senate Select Committee on Indian Affairs and the House Committee on Interior and Insular Affairs after July 27, 1982, but prior to enactment of this Act or by notifying the Secretary within thirty days after enactment of this Act, such authority is hereby ratified: *Provided*, That such ratification shall not constitute a congressional determination of the validity or legality of any particular provision of such agreement.

(c) Where an affected Indian tribe does not provide notice as provided in subsection (b) of this section, the Secretary shall review, within one hundred and twenty days after enactment of this Act any such prior agreement to determine if it complies with the purposes of this Act and other appropriate provisions of law. Where the Secretary fails to act within the allotted time, the previous approval of the Secretary shall be deemed ratified as provided in subsection (b) of this section.

SEC. 7. Nothing in this Act shall affect, nor shall any Minerals Agreement approved pursuant to this Act be subject to or limited by, the Act of May 11, 1938 (52 Stat. 347; 25 U.S.C. 396a *et seq.*), as amended, or any other law authorizing the development or disposition of the mineral resources of an Indian or Indian tribe.

SEC. 8. Any Indian tribe, subject to the approval of the Secretary, may enter into an agreement to pledge or hypothecate its interest in mineral resources which have been lawfully severed from the land, or their production, products or proceeds, as security for the repayment of funds provided to Indian tribes to finance the cost of development of its mineral resources. The pledge or hypothecation agreement may be enforced only against the specified pledged severed mineral resources, or the pledged production, products or proceeds, and only in accordance with the terms and conditions of the agreement. The United States shall not be deemed a necessary party in any action to enforce such agreement.

SEC. 9. In carrying out the obligations of the United States, the Secretary shall ensure that, upon the request of an Indian tribe and to the extent of his available resources, such tribe shall have available advice, assistance, and information during the negotiation of a Minerals Agreement. The Secretary may fulfill this responsibility either directly through the use of Federal officials and resources or indirectly by providing financial assistance to the Indian tribe to secure independent assistance.

SEC. 10. Within one hundred and eighty days of the date of enactment of this Act, the Secretary of the Interior shall promulgate rules and regulations to facilitate implementation of this Act. The Secretary shall, to the extent practicable, consult with national and regional Indian organizations and tribes with expertise in mineral development both in the initial formulation of rules and regulations and any future revision or amendment of such rules and regulations. Where there is pending before the Secretary for his approval a Minerals Agreement of the type authorized by section 3 of this Act which was submitted prior to the enactment of this Act, the Secretary shall evaluate and approve or disapprove such agreement based upon Section 4(b) and Section 5 of this Act, but shall not withhold or delay such approval or disapproval on the grounds that the rules and regulations implementing this Act have not been promulgated.

(b) Where the Secretary has approved a Minerals Agreement in compliance with the provisions of this Act any any other applicable provision of law, the United States shall not be liable for any losses sustained by a tribe or individual Indian as a result of changes in markets for any minerals subject to such Mineral Agreement or as a result of decisions made by the parties to the agreement in the course of doing business pursuant to the terms of such agreement: *Provided*, That the Secretary shall continue to have a trust obligation to ensure that the legal rights of a tribe or individual Indian are protected in the event of a violation of the terms of any Minerals Agreement by any other party to such agreement.

(c) Nothing contained in this Act shall absolve the United States from any responsibility to the Indians, including those which derive from the trust relationship and from any treaties, executive orders, or agreements between the United States and any Indian tribe.

SEC. 11. Nothing in this Act shall impair any right of an Indian tribe organized under section 16 or 17 of the Act of June 18, 1934 (48 Stat. 987), as amended, to develop their mineral resources as may be provided in any constitution or charter adopted by such tribe pursuant to that Act.

PURPOSE

The purpose of S. 1894 is to permit Indian tribes to enter into various kinds of agreements for the development and disposition of their energy and non-energy mineral resources.

BACKGROUND

The development and disposition of an Indian tribe's interest in the mineral resources of its trust or restricted lands is subject to several existing Federal laws. In reecnt years, as some tribes have sought to deal more effectively with their mineral resources and realize a greater return on those resources through innovative, flexible business arrangements, those laws have proven to be obstacles in some cases.

At the present time, the most frequently used authority for the development of Indian tribal mineral resources is the Omnibus Indian

Mineral Leasing Act of May 11, 1938 (52 Stat. 347; 25 U.S.C. 396a et seq.). Section 396a of title 25 permits the leasing of tribal land for mining purposes for a term not to exceed 10 years and so long thereafter as minerals are produced in paying quantities. Leases are executed by the tribe subject to the approval of the Secretary. Section 396b requires, in most instances, that oil and gas leases be offered for sale by advertisement followed by competitive bidding.

The maximum lease term prescribed by section 396a may be undesirable for two reasons. First, with many mining leases, the 10 year exploratory period is insufficient for development to begin; the lead times required to conduct preliminary assessments, acquire the necessary permits and financial backing, outline the deposit and prepare the site for development freqeuntly take longer than 10 years.

Second, the "production in paying quantities" clause is a term of art borrowed from oil and gas law. The 1938 Act applied the term to hardrock minerals and thereby created occasional unanticipated problems, because hardrock mineral markets are subject to considerable fluctuation. As a result, lessees have sometimes found that they are no longer producing "in paying quantities" after the tenth anniversary of the lease, merely because of a cyclical dip in the market for the mineral being produced. When this happens, the lease may terminate, against the wishes of lessor and lessee, even though a large deposit still remains and production would normally resume when market conditions improve.

Experience has also shown that the requirement in section 396b of competitive bidding for the leasing of tribal oil and gas does not always work to the advantage of the tribes. Certain tribes which have been able to negotiate oil and gas development agreements appear to have received greater compensation than they had been receiving under competitive bidding.

The most serious problem with section 396a, however, is that it authorizes development of tribal oil and gas resources only by leasing. This requirement ignores the possibility of joint ventures, joint production agreements, risk service contracts and other non-lease ventures which are commonly used in mineral development today. Such non-lease ventures can provide the vehicle by which tribes can become directly involved in management decisions. The normal lease arrangement merely turns over responsibility for all development decisions to the lessee.

Since 1975, the Department of the Interior has approved a number of non-lease ventures involving the development of mineral resources, pursuant to section 81 of title 25 (R.S. section 2103). That section requires the approval of the Secretary of the Interior and the Commissioner of Indian Affairs for contracts for services relative to Indian lands. Section 81 is inadequate to solve the problems posed by the 1938 Act discussed above.

First, because section 81 does not apply to leases, it leaves intact the limitations in the 1938 Act. Second, the approval procedure for non-lease ventures under section 81 requires a rather cumbersome case-by-case analysis to determine whether the document submitted for approval is a service agreement within the purview of the 1938 Act, or an interest in land within the purview of the Indian Non-Intercourse Act (R.S. 2116; 25 U.S.C. 177). Third, with the proliferation and

hybridization of non-lease ventures, it is increasingly difficult to make the determination described. Without clarification of the Secretary's authority for approval of existing ventures, because of the confusion concerning the Secretary's authority to approve non-lease ventures, the Department is reluctant to approve a number of proposed agreements which are pending.

SECTION-BY-SECTION ANALYSIS

Section 1

Section 1 provides that the Act may be cited as the "Indian Mineral Development Act of 1982".

Section 2

Section 2 defines the terms "Indian", "Indian tribe", and "Secretary" as used in the Act.

Section 3

Subsection (a) authorizes Indian tribes, if permitted by their own internal governing documents and subject to the approval of the Secretary of the Interior, to enter into various kinds of commercial agreements for the development of their energy and non-energy mineral resources. The Committee does not mean, by enumerating various kinds of agreements, to limit the scope of this authority. The subsection permits the sale or other disposition of such mineral resources, but only as a part of an overall development plan approved under this Act and not a simple sale in situ.

Subsection (b) provides that an Indian individual may include his mineral resources in a tribal Minerals Agreement if the other parties concur and the Secretary approves. The Secretary must find that such participation is in the best interest of the Indian.

Section 4

Subsection (a) provides that the Secretary must approve or disapprove a Minerals Agreement submitted to him either 180 days after submission or, if an environmental impact statement is required, 60 days after compliance, whichever is later. The subsection also provides that an affected party may seek a writ of mandamus under section 1361 of title 28, United States Code, is in the event the Secretary fails to act within the time allotted. A failure to act within the time required will not result in an automatic approval nor would the Secretary's power to approve lapse for failure to act within the time limit.

A provision in the amendment in the nature of a substitute adopted by the Committee contained a requirement that the tribe inform its general membership of its intent to execute a Minerals Agreement before the Secretary could approve of the agreement. The deletion of this provision should not be taken as a Committee denigration of the importance of an informed tribal membership with respect to these agreements.

Subsection (b) requires the Secretary, where he has formed an intent to approve or disapprove a Minerals Agreement submitted to him, to give the tribe his written findings supporting his proposed decision 30 days before he formally approves or disapproves the agreement. It also provides that these findings and all other information of a business or

financial character relating to such agreements shall be deemed privileged proprietary information.

Subsection (c) provides that the authority to disapprove agreements may not be delegated by the Secretary below the Assistant Secretary of the Interior for Indian Affairs and that a decision of the Secretary or Assistant Secretary to disapprove an agreement shall be considered a final agency action for purposes of any appropriate judicial review.

The bill, as referred to the Committee, contained language which essentially eliminated any administrative review or appellate procedure on a disapproval and provided for immediate, de novo judicial review by the Federal District Court. This language was included to prevent long, drawn-out administrative and judicial processes which would be inimical to the orderly development and implementation of commercial transactions. The Committee determined that this solution was to restrictive in meeting a legitimate goal.

The new subsection (c) will limit the length of administrative review by reducing the administrative levels with respect to disapproval and by providing immediate judicial review of such actions. The language would permit the authority to approve agreements to be delegated to a lower level which might result in earlier approvals.

Section 5

Section 5 provides that, in approving or disapproving an agreement, the Secretary shall determine if it is in the overall best interest of the tribe. The section sets out six non-exclusive criteria the Secretary shall apply in evaluating agreements. The Committee does not intend that the mere presence or absence of an element set out in these criteria should result in an automatic approval or disapproval. The inclusion of these criteria in the statute is merely meant to reflect the importance the Committee attaches to these considerations.

Section 6

Subsection (a) provides that non-lease agreements of the kind authorized by this Act which have been entered into after January 1, 1975, but prior to the date of enactment of this Act shall be processed as provided in subsections (b) and (c).

Subsection (b) would provide an automatic ratification of the Secretary's previous approval of such agreements where the tribe notifies the Senate Select Committee on Indian Affairs and the House Committee on Interior and Insular Affairs after July 27, 1982, but before enactment, or notifies the Secretary within 30 days of enactment that it desires the approval to be ratified. The Committee intends that a letter from the chief executive of a tribe together with any past tribal resolutions supporting the agreement would be sufficient for this purpose. The subsection also makes clear that any ratification of a previous approval by the Secretary under this section shall not be deemed a congressional determination that the actual provisions or terms of such an agreement are valid or legal.

Subsection (c) provides that where an affected tribe does not notify the Committees or the Secretary as provided in subsection (b), the Secretary shall review the subject agreements within 120 days after enactment and approve or disapprove them based upon the purposes of this Act and other appropriate law. Failure of the Secretary to act

within that time would result in the previous Secretarial approval being ratified as provided in subsection (b).

Section 7

Section 7 provides that nothing in this Act shall affect the provisions of the 1938 Indian Mineral Leasing Act or any other law authorizing the development or disposition of tribal or individual Indian mineral resources nor shall anything in those laws affect a Minerals Agreement approved under this Act.

Section 8

Section 8 authorizes an Indian tribe, subject to the approval of the Secretary, to pledge or hypothecate its interest in tribal mineral resources which have otherwise been lawfully severed from the land or the prospective production, products or proceeds of such minerals under any approved development plan as security for the repayment of loans or other advances to permit the tribe to develop its mineral resources. The pledge or hypothecation agreement may be enforced only with respect to the specific mineral resource or interest set out in the agreement and only according to the terms of the agreement. Where enforcement entails judicial action which is authorized under existing law, the United States shall not be deemed a necessary party.

Section 9

Section 9 provides that the Secretary, in carrying out his trust responsibility, shall ensure that the tribes are provided, to the extent of available resources, necessary advice and assistance in negotiation of minerals agreements.

Section 10

Subsection (a) provides that the Secretary shall promulgate rules and regulations implementing this Act within 180 days after enactment after consultation with appropriate Indian tribes and organizations. It also provides that, where there is pending before the Secretary Minerals Agreements submitted before the passage of this Act, the Secretary shall evaluate and approve or disapprove such agreements based upon the provisions of section 4(b) and section 5, but that he shall not withhold such action solely on the grounds that no rules and regulations have been promulgated.

Subsection (b) provides that, where the Secretary has approved an agreement under the terms of this Act and other applicable laws, the United States shall not be liable for any losses sustained by a tribe or Indian as a result of market changes or business decisions of the parties in carrying out the agreement. The subsection also provides, however, that the Secretary shall continue to have a trust responsibility to insure that the other party or parties do not violate the terms of the agreement to the detriment of the Indian parties.

In its report on this legislation, the Administration strongly recommended that the bill be amended to include language holding the United States harmless for any loss to an Indian party to an agreement because of the Secretary's approval. As far as the Committee is concerned, this simply restates the law as it exists today. If the Secretary, acting as trustee, approves a lease or an agreement or otherwise acts in relation to the trust resources of an Indian tribe and acts

responsibly and within his discretion in doing so, the United States would not be liable for any loss or impairment of the trust resources. On the other hand, if the Secretary acts recklessly and in abuse of his discretion as trustee, the United States cannot avoid liability. The Administration's recommendation, adopted by the Committee, simply restates that law.

Representatives of concerned Indian tribes were alarmed at the Administration's recommendation and viewed it as a total release of the United States' responsibility as trustee. While this was not the case, the Committee sought to allay their concerns by adding the proviso contained in subsection (b). This, too, simply restates the existing law. The United States cannot be held to be a guarantor of the business enterprises of an Indian tribe nor an insuror against business losses from the implementation of an agreement nor against acts of God. Nevertheless, the Secretary retains an obligation to see that the non-Indian parties do not violate or vary the terms of the agreement to the detriment of the Indian parties. The Committee has had recent examples of this in the allegations of loss of royalties under Federal and tribal oil and gas leases because of inadequate monitoring and review of company activities and reporting.

The Committee wishes to make clear that, in adopting the language of subsection (b) to allay the concerns of both the Administration and the Indian tribes, it is not intending either to expand or contract the trust responsibility of the United States to Indians and Indian tribes.

Subsection (c) simply provides that nothing in this Act shall alter the responsibility of the United States to Indians deriving from any other source.

Section 11

Section 11 provides that nothing in this Act shall impair any independent right a tribe organized under the Indian Reorganization Act of 1934 may have with respect to the development of its mineral resources.

COMMITTEE AMENDMENT

Hearings by the Committee on S. 1894 disclosed certain gaps in the language of the bill with respect to authorization, approval and implementation of these Minerals Agreements. In addition, testimony from the Indian tribes and organizations, the Administration, and mineral development companies indicated further concerns about the provisions.

In response to these gaps and concerns, the Committee, working with the concerned parties, developed an amendment in the nature of a substitute to S. 1894. While the substitute maintained the basic purpose and provisions of the bill, as referred, it did make numerous changes and additions which are fully explained in the section-by-section analysis.

In a statement submitted for the record, the Governor of the State of Montana recommended an amendment which would have had the effect of authorizing State taxation of the non-Indian portions of, or activity under, Minerals Agreement. The Committee declined to recommend the amendment.

The Supreme Court, in recent years, has begun to illuminate this issue under existing law without difficulty. In fact, this very issue is

now pending before the Supreme Court on a petition for certiorari in the *Crow Tribe of Indians* v. *State of Montana*, 650 F.2d 1104 (1982). If there was a need for Congressional clarification of the law in this area, the Committee determined that this was not the appropriate vehicle.

COST AND BUDGET ACT COMPLIANCE

S. 1894 does not authorize the appropriation of any funds and its enactment will not result in any additional cost to the United States. Because of time constraints beyond its control, the cost analysis of the Congressional Budget Office was not received at the time of the filing of this report.

INFLATIONARY IMPACT STATEMENT

Enactment of S. 1894, as amended, would have no negative inflationary impact. As the purpose of the bill is to facilitate the development of tribal energy and non-energy resources, it would thereby increase the availability of the domestic supply of these resources and might have some minimal positive inflationary impact.

OVERSIGHT STATEMENT

No specific oversight activities were undertaken by the Committee and no recommendations were submitted to the Committee pursuant to rule X, clause 2(b)2.

COMMITTEE RECOMMENDATION

By a voice vote, the Committee approved the amendment in the nature of a substitute to S. 1894, and the Committee recommends the enactment of the bill, as amended, by the House.

DEPARTMENTAL REPORT

The report of the Department of the Interior, dated August 9, 1982, follows:

U.S. DEPARTMENT OF THE INTERIOR,
OFFICE OF THE SECRETARY,
Washington, D.C., August 9, 1982.

Hon. MORRIS K. UDALL,
Chairman, Committee on Interior and Insular Affairs,
House of Representatives, Washington, D.C.

DEAR MR. CHAIRMAN: The following are our views on S. 1894, a bill "To permit Indian tribes to enter into certain agreements for the disposition of tribal mineral resources, and for other purposes."

We oppose enactment of this legislation unless it is amended as recommended herein and in our earlier testimony. These amendments are essential to make the legislation acceptable to the Department.

The first section of S. 1894, if enacted, would allow any recognized Indian tribe, band or other group of Indians subject to the jurisdiction of the United States to enter into any joint agreement, operating agreement, production sharing agreement, service agreement, managerial agreement, lease agreement or other agreement approved by the Secretary of the Interior for (1) the disposition of oil and gas,

geothermal, coal and other energy or non-energy mineral resources owned by a tribe or (2) the sale or production of such tribal minerals. Any such agreement would be for such term and subject to such conditions as the Secretary may require by regulation. Unless the Secretary were to find that the agreement was not in the best interests of the tribe, he would have to approve the agreement within 180 days of its submission to him or within 30 days of compliance with the National Environmental Policy Act of 1969 (42 U.S.C. 4332) or any other requirement of law, whichever was later. His findings would have to be in writing and be made available to the affected tribe at least 30 days before his final decision.

If the Secretary disapproved the proposed agreement, the parties involved would have standing to bring a cause of action in Federal district court, notwithstanding the requirements of the Administrative Procedure Act. Hearing of such cases would be given expedited procedure by the court. If the complaining party prevailed, the court could assess reasonable attorney fees and litigation costs against the United States.

Section 2 would allow individual Indians owning trust or restricted minerals within the boundaries of a reservation to join with the tribe in an agreement listed in section 1, subject to the approval of the Secretary.

Section 3 would direct the Secretary to review, within 90 days of enactment of the bill, any existing non-lease agreement approved between June 1975 and April 1981, to determine if it complies with the provisions of the Act.

Section 4 would provide that any tribe or individual Indian, upon request to the Secretary, be given qualified, independent, expert advice for: determination of potential mineral values; social, environmental and economic analyses; legal assistance; and other technical services relating to the valuation, development, production and sale of minerals, as defined in section 1. Costs would be reimbursed pursuant to the provisions of the Act of March 1, 1933 (25 U.S.C. 413).

Section 5 would provide that nothing in this bill, if enacted, would affect any lease approved or hereafter approved pursuant to the Act of May 11, 1938, as amended (52 Stat. 347; 25 U.S.C. 396a et seq.).

Section 6 would provide for promulgation of rules and regulations to implement the terms of this bill within 180 days of enactment. Indian tribes, to the extent practicable, would be consulted in the initial formulation and future revision or amendment of such rules and regulations.

At the present time, the most frequently used authority for the development of Indian tribal mineral resources is the Omnibus Indian Mineral Leasing Act of May 11, 1938 (52 Stat. 347; 25 U.S.C. 396a et seq.). Section 396a of title 25 permits the leasing of tribal land for mining purposes for a term not to exceed ten years and so long thereafter as minerals are produced in paying quantities. Leases are executed by the tribe subject to the approval of the Secretary. Section 396b requires, in most instances, that oil and gas leases be offered for sale by advertisement followed by competitive bidding.

We believe the maximum lease term prescribed by section 396a is undesirable for two reasons. First, with many mining leases, the ten year exploratory period is insufficient for development to begin; the

lead times required to conduct preliminary assessments, acquire the necessary permits and financial backing, outline the deposit and prepare the site for development frequently take longer than ten years.

Second, the "production in paying quantities" clause is a term of art borrowed from oil and gas law. The 1938 Act applied the term to hardrock minerals and thereby created occasional unanticipated problems, because hardrock mineral markets are subject to considerable fluctuation. As a result, lessees have sometimes found that they are no longer producing "in paying quantities" after the tenth anniversary of the lease, merely because of a cyclical dip in the market for the mineral being produced. When this happens, the lease may terminate, against the wishes of lessor and lessee, even though a large deposit still remains and production would normally resume when market conditions improve.

Experience has also shown that the requirement in section 396b of competitive bidding for the leasing of tribal oil and gas does not always work to the advantage of the tribes. Certain tribes which have been able to negotiate oil and gas development agreements appear to have received greater compensation than they had been receiving under competitive bidding. Under S. 1894, tribes would have the option of negotiating agreements or soliciting competitive bids under the procedures envisioned for implementation of the new Act.

The most serious problem with section 396a, however, is that it authorizes development of tribal oil and gas resources only by leasing. This requirement ignores the possibility of joint ventures, joint production agreements, risk service contracts and other non-lease ventures can provide the vehicle by which tribes can become directly involved in management decisions. The normal lease arrangement merely turns over responsibility for all development decisions to the lessee. The bill would facilitate tribes' direct involvement in such decisions, thereby enabling them to gain management experience and contributing significantly to the goal of self-determination.

Since 1975, the Department has approved a number of non-lease ventures involving the development of mineral resources, pursuant to section 81 of title 25 (R.S. section 2103). That section requires the approval of the Secretary of the Interior and the Commissioner of Indian Affairs for contracts for services relative to Indian lands. We believe section 81 is inadequate to solve the problems posed by the 1938 Act discussed above.

First, because section 81 does not apply to leases, it leaves intact the limitations in the 1938 Act. Second, the approval procedure for non-lease ventures under section 81 requires a rather cumbersome case-by-case analysis to determine whether the document submitted for approval is a service agreement within the purview of the 1938 Act, or an interest in land within the purview of the Indian Non-Intercourse Act (R.S. 2116; 25 U.S.C. 177). Third, with the proliferation and hybridization of non-lease ventures, it is increasingly difficult to make the determination described. Without clarification of the Secretary's authority for approval of existing ventures, some non-lease ventures previously approved may be called into question. Finally, because of the confusion concerning the Secretary's authority to approve non-lease ventures, the Department is reluctant to approve a number of proposed agreements which are pending.

We believe enactment of S. 1891 would provide a means for the United States to promote tribal self-determination in the development of Indian mineral resources, if it is amended as we propose. The bill would leave to regulations the establishment of maximum terms for, the conditions of, and the manner of entering into non-lease agreements. We support this procedure because it permits the authority granted by the legislation to adapt to changes in the mineral industry and to respond to the particular requirements of numerous types of non-lease ventures.

As noted previously, we have suggested several amendments to the bill. Briefly, they are:

In the first section, an amendment of the time period for issuance of a Secretarial decision, following compliance with applicable statutes;

Amendment of section 1(c) to assure protection of information provided to the tribes;

Deletion of section 1(d), as we discern no reason for avoiding the existing administrative review procedures;

Clarification of section 3 to provide for approval of certain agreements previously approved between January 1, 1975, and the date of enactment of this bill; and

Deletion of section 4, because authority already exists for us to provide such mining, analytical, legal and technical assistance and to recover the costs thereof.

We would like to elaborate on these last two points. Section 3, as passed by the Senate, requires the Secretary to review existing non-lease agreements approved between June 1975 and April 1981, to determine if they comply with the provisions of the Act. No guidance is given as to what would be the effect of finding that an agreement does not comply with the provisions of the Act. Presumably, this provision could be construed as requiring cancellation of the agreement, if it is found not to comply in some way with the Act. We do not believe there is any basis for enacting a provision which might have the effect of questioning the validity of the existing agreements.

Such agreements were entered into in good faith by the parties, and were approved in good faith by Departmental officials who believed they had sufficient authority to do so. Significant investments have been made by the parties, and we believe the language of section 3, as passed by the Senate, may well give rise to undesirable litigation challenging the Secretary's review of such agreements. Consequently, we recommend that the following language be substituted in lieu of the Senate-passed language: "Section 3. Any agreement for the development of tribally owned minerals which (1) was previously approved by the Secretary or his authorized delegate, between January 1, 1975, and the date of enactment of this Act, and (2) did not purport to be a lease when it was presented to the Department of the Interior for its approval, is hereby considered approved as of the date of such previous approval."

Use of the phrase "did not purport to be a lease" is designed to avoid future inquiries over whether one of the agreements approved since 1975 was or was not a lease, the very inquiry which this legislation makes unnecessary for all future tribal mineral development agreements. We believe less than a dozen approved agreeemnts fall within the scope of this proposed alternative language for section 3.

Section 4 would require the Secretary, at the request of a tribe, to provide independent expert advice concerning valuation, development, production and sale of Indian mineral resources. This section would also allow the Secretary to seek reimbursement for these services out of the proceeds of any mineral production. Notwithstanding this reimbursement provision, we view section 4 as unwieldy and potentially very costly. Apparently, if a tribe were to request legal assistance, for example, the Secretary would have no discretion under section 4 to refuse to fund the payment of tribal attorneys. Yet, such requests from many tribes will no doubt exceed available funds appropriated for such purposes. The Department already has authority to provide these services under the provisions of the Act of November 2, 1921 (25 U.S.C. 13; 42 Stat. 208), and there is also existing authority under 25 U.S.C. 413 for reimbursement for such services. Consequently, additional statutory authorization is not required. We recommend that this section be deleted.

Three additional changes have been strongly recommended by the Department. Since we all recognize that this legislation would benefit the Indian community, we request that these changes, as well as the ones noted above, be made, lest the favorable prospects for this legislation be endangered.

Section 1(d)(4), permitting courts to assess certain attorney fees against the United States, should be deleted in its entirety. We have consistently opposed such authority and do so now, on the grounds that if fosters and encourages unnecessary litigation, and that other laws already exist for this purpose.

The definition of "Indian tribe" in the first section may give rise to questions to eligibility, and should be amended to include only those tribes recognized by the Secretary of the Interior as eligible for services provided to Indians by the Bureau of Indian Affairs.

A new section 7 should be added, to hold the Secretary harmless from any damages based upon approval of any agreement authorized under the bill, if enacted. This language was provided earlier, during the presentation of our testimony on S. 1894 to the Committee, and we are willing to work with the Committee to perfect the language.

We stress that we would strenuously oppose enactment of the bill without the above three essential amendments. With respect to proposed section 7, the kinds of tribal-sharing agreements envisioned by S. 1894 will likely involve substantial risks which tribes would be willing to assume, to provide an opportunity to maximize tribal profits and control over operations. Since the Secretary would be required by the bill to grant general approval of such agreements, unless he finds that it is not in the tribe's best interest, we strongly believe it is the tribes, as the willing parties to these agreements, who should rightfully assume the risks. The Federal taxpayer should not be a guarantor of the wisdom of the tribes' business judgments, especially for business activities involving acknowledged risks.

The Office of Management and Budget has advised that there is no objection to the presentation of this report to Congress and that, unless the bill is amended as recommended herein, the enactment of S. 1894 would not be in accord with the program of the President.

Sincerely,

ROY H. SAMPSEL,
Acting Assistant Secretary.

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